NGAN CHIN WEN

v.

PANIN INTERNATIONAL CREDIT (S) PTE LTD

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
MOHD SAARI YUSOFF JCA
ABDUL AZIZ MOHAMAD J
[CIVIL APPEAL NO: W-02-1094-01]
24 DECEMBER 2002

CIVIL PROCEDURE: *Stay of execution - Application to stay execution of registration of foreign judgment - Principles applicable - Whether applicant had an arguable case - Whether successful appeal would be rendered nugatory*

CIVIL PROCEDURE: *Judgments and orders - Stay of execution - Application to stay execution of registration of foreign judgment - Principles applicable - Whether applicant had an arguable case - Whether successful appeal would be rendered nugatory*

CIVIL PROCEDURE: *Reciprocal enforcement of judgments - Service of writ - Whether service of writ of summons authorised - Rules of the High Court 1980, O. 10, O. 11, O. 65 - Rules of Court 1996 [Singapore], O. 11 rr. 3(8), 4(2)(c)*

The respondent had obtained judgment in default in the High Court of Singapore against the applicant concerning a claim on a promissory note. The respondent applied in the High Court of Malaya for registration of the said judgment pursuant to s. 4(2) of the Reciprocal Enforcement of Judgments Act 1958; the application was granted. The applicant appealed against this decision, and accordingly applied to the High Court for a stay of execution of this order pending the appeal. The High Court refused a stay and the applicant then applied to this court by way of notice of motion for a stay.

The applicant contended that service of the writ of summons upon him was not an authorised mode of service under Malaysian law, namely O. 65 of the Rules of the High Court 1980 ('RHC'). He also averred that if the stay was refused and he settled the amount of the judgment, his appeal, if it were ultimately allowed, would have been rendered nugatory because he would not be able to recover from the respondent the money that he had paid to it since the respondent had no assets in Malaysia.

Held:

Per Mohd Saari Yusoff JCA (majority)

[1] For the purpose of this proceeding, in view of the conflicting decisions in cases dealing with service of a writ by an agent, it afforded a ground for the appellate court to determine the issue, meaning that the applicant had an arguable case. Furthermore, the respondent, being based in Singapore, did not have assets within the jurisdiction of this court. The judgment sum was substantial, and if the applicant were to settle it, there was a strong likelihood that the applicant may not be compensated if he succeeded in the appeal; this would render the applicant's appeal nugatory. Thus, in applying the principles regarding an application for a stay of execution to the facts and circumstances of the present case, it was proper that a stay be granted. (pp 574 b-d & 575 d)

Per Abdul Aziz Mohamad JCA (dissenting)

[1] In this case, O. 65 of the RHC was irrelevant as it concerned service of a foreign writ in Malaysia, whereas, service for the question of jurisdiction of the Singapore High Court was service in the circumstances authorised or manner prescribed by the Singapore Rules of Court 1996 ('the Rules'). The effect of O. 11 r. 3(8) and r. 4(2)(c) of the Rules is, where the defendant is in Malaysia, to authorise a method of service that is authorised by the laws of Malaysia for service of any originating process issued by Malaysia, and O. 10 and O. 11 of the RHC either allows, by not prohibiting, service by an agent where service of the Malaysian process is to be in Malaysia or expressly allows service by an agent where the Malaysian process is to be served abroad. Furthermore, in the event the appeal was allowed, it would not be rendered nugatory, as there was no evidence to throw doubt on the respondent's ability to refund the judgment sum. (pp 582 b-d & 583 e)

[Ordered accordingly.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Pihak responden telah memperolehi penghakiman ingkar di Mahkamah Tinggi Singapura terhadap pihak pemohon berkenaan dengan suatu tuntutan mengenai nota janji hutang. Pihak responden memohon di Mahkamah Tinggi Malaya untuk pendaftaran penghakiman tersebut di bawah s. 4(2) Akta Penguatkuasaan Penghakiman Bersaling 1958; permohonan tersebut dibenarkan. Pihak pemohon merayu menentang keputusan tersebut, dan seterusnya memohon kepada

Mahkamah Tinggi untuk penggantungan pelaksanaan aturan tersebut sementara menanti keputusan rayuan. Mahkamah Tinggi menolak penggantungan dan pihak pemohon memohon ke mahkamah ini melalui notis usul untuk penggantungan.

Pihak pemohon mempertikaikan bahawa penyampaian writ saman terhadap beliau bukan cara penyampaian diberikuasa di bawah undang-undang Malaysia, iaitu O. 65 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'). Beliau juga menegas bahawa jikalau penggantungan tersebut ditolak dan beliau membayar amaun penghakiman, rayuan beliau, kalau ia akhirnya dibenarkan, akan menjadi tidak berguna sebab beliau tidak berupaya mendapat kembali dari pihak responden duit yang telah dibayar kepadanya kerana pihak responden tidak mempunyai aset di Malaysia.

Diputuskan:
Oleh Mohd Saari Yusoff HMR (majoriti)

[1] Bagi tujuan prosiding ini, memandangkan keputusan-keputusan bercanggah dalam kes-kes berurusan dengan penyampaian writ melalui agen, ia memberi alasan kepada mahkamah rayuan untuk menentukan isu tersebut, yang bermaksud bahawa pihak pemohon mempunyai kes yang boleh dihujah. Lagipun, pihak responden, yang bertempat di Singapore, tidak mempunyai aset mengikut had bidangkuasa mahkamah ini. Amaun penghakiman tersebut cukup banyak, dan jikalau pihak pemohon membayarnya, ia berkemungkinan besar bahawa pihak pemohon tidak dapat dibayar pampasan kalau rayuan beliau berjaya; ini akan membuatkan rayuan pihak pemohon tidak berguna. Oleh itu, dengan menggunakan prinsip-prinsip berkenaan permohonan untuk penggantungan pelaksanaan kepada fakta dan keadaan kes ini, adalah betul bahawa penggantungan dibenarkan.

Oleh Abdul Aziz Mohamad HMR (menentang)

[1] Dalam kes ini, O. 65 KMT tidak relevan sebab ia melibatkan penyampaian writ asing di Malaysia, sementara, penyampaian bagi soal bidangkuasa Mahkamah Tinggi Singapura adalah penyampaian di dalam keadaan yang diberikuasa atau cara yang ditentukan oleh Kaedah-kaedah Mahkamah Singapura 1996 ('Kaedah tersebut'). Efek O. 11 r. 3(8) dan r. 4(2)(c) Kaedah tersebut adalah, di mana defendan berada di Malaysia, untuk memberikuasa kepada cara yang diberikuasa oleh undang-undang Malaysia untuk penyampaian proses pemula yang dikeluarkan oleh Malaysia, dan O. 10 dan O. 11 KMT yang membenarkan, dengan tidak melarang, penyampaian oleh agen di mana penyampaian proses Malaysia adalah di dalam Malaysia ataupun membenarkan secara ekspress penyampaian oleh agen di mana proses Malaysia disampai ke luar negeri. Tambahan pula,

jika rayuan tersebut dibenarkan, ia bukan menjadi tidak berguna, kerana tiada keterangan yang menyebabkan keraguan terhadap kebolehan pihak responden untuk membayar balik amaun penghakiman.

Diperintah sedemikian.]

Case(s) referred to:

Alexander v. Cambridge Credit Corp Ltd [1985] 10 ACLR 42 ***(foll)***

Commerzbank (South East Asia Ltd) v. Tow Kong Liang [2002] 3 CLJ 95 HC ***(refd)***

Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ 380 CA ***(foll)***

Saeed U Khan v. Lee Kok Hooi [2000] 7 CLJ 454 HC ***(refd)***

United Overseas Bank Ltd v. Wong Hai Ong [1999] 5 MLJ 405 HC ***(refd)***

Legislation referred to:

Reciprocal Enforcement of Judgments Act 1958, ss. 4(2), 5(1)(a)(ii)

Rules of the High Court 1980, O. 10 r. 1(1), O. 11 r. 6(1)(b)(ii), (2)(b)(ii), O. 62 r. 3, O. 65 rr. 2(1), (3), 3(1), (3), O. 67 rr. 5, 7, 10

Rules of Court 1996 [Sing], O. 11 rr. 3(8)(a), 4(2)(c), O. 79 r. 4(1), (2)

Supreme Court of Judicature Act [Sing], s. 16(1)(a)(ii)

For the applicant/defendant - Allen Miranda Emmanuel (Ng Thiang Tuan); M/s Sykt Kam Woon Wah & Co

For the respondent/plaintiff - Maniam Kuppusamy (Kamil Azman Abdul Razak); M/s Skrine

[Appeal from High Court, Kuala Lumpur; Originating Summons No: R2-24-23-2000]

Reported by Suresh Nathan

JUDGMENT

Mohd Saari Yusoff JCA:

On 4 January 2002, the applicant applied to the High Court for stay of execution of the Court Order granted on 12 December 2001 pending appeal. The learned judge dismissed the application on 14 May 2002, hence this application for stay.

The facts may briefly be stated as follows. At all material times, the applicant, a Malaysian, was carrying on business at Ngan & Ngan Holdings Sdn Bhd, Tingkat 10, Wisma Central, Jalan Ampang, 50450 Kuala Lumpur. The respondent was a company based in Singapore.

On 22 December 1999, the respondent obtained judgment in default ("the said judgment") against the applicant at the High Court Singapore *vide* Suit No. 1404 of 1999. Pursuant to O.S. No R2-24-23-2000 filed by the respondent at High Court Malaya at Kuala Lumpur, the learned judge granted leave to the respondent for the said judgment to be registered pursuant to s. 4(2) of Reciprocal Enforcement of Judgment Act 1958.

In the present case, the writ issued by Singapore High Court was served on the applicant through an agent, which act was *ultra vires* of our law namely O. 65 RHC 1980. In his written submission, the learned cousel for the applicant cited the recent decision of Wahab J in *Commerzbank (South East Asia Ltd) v. Tow Kong Liang* [2002] 3 CLJ 95, which followed the ratio in the case of *United Overseas Bank Ltd v. Wong Hai Ong* [1999] 5 CLJ 405. In *United Overseas Bank (supra),* at p. 415 Ian Chin J said:

> In my view there is absolutely no reason why service of the legal process of Singapore or Brunei Darussalam cannot and should not be done through the special provision of the Singapore O. 11 r. 3(8) which is by our judicial officer and that, in my view, is the only permissible method of service other than the method under O. 65. The fact that service by an agent is not expressly prohibited does not mean that Singapore O. 11 r. 3(8) need not be complied with. That provision and O. 65 are enacted for observance and not to be ignored, and, implicitly, all other methods of service will not be allowed since it amounts to the exercise of the jurisdiction of the Singapore courts in Malaysia. Therefore, in my respectful view, the said opinion expressed in this regard by *Malaysian High Court Practice* (vol 1, 1998 edn) at pp. 4424-4454 is not correct.
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> In so far as the Singapore O. 11 r. 3(8)(a) is concerned, it cannot be read as allowing the service of the writ in Malaysia by a private agent as that is only allowed in Malysia in respect of processes originating in Malaysia and not foreign process.

Further, his lordship said:

> It was mentioned that the defendant should have taken action in Singapore to set aside the service and since he had not done so, he should not be allowed to challenge the validity of the service, citting *Harrisons Trading (Peninsular) Sdn Bhd v. Juta Perkasa Sdn Bhd & Ors* [1977] 2 SLR 496. No doubt he could do that but the failure to do so does not mean that this court is precluded from considering and taking into account the fact that the service of the writ was in breach of the said rules and that it would be contrary to Malaysia's public policy to enforce such a judgment. There is more to it than just the right of the defendant. It is a matter affecting the sovereignty of Malaysia and the observance of the said rules. This is a matter which the

> said Act allows the court yo take into consideration irrespective of whether action had been taken to set aside the service. It does not do injustice to the plaintiff as all they need to do is to have the said judgment set aside and then to serve the writ through the proper channel and in accordance with the Singapore O. 11 r. 3(8) or O. 65.

However, in *Saeed U Khan v. Lee Kok Hooi* [2000] 7 CLJ 454, the learned trial judge disagreed with the *ratio* in *United Overseas Bank*'s case *(supra).* Be that as it may, for purpose of this proceeding, in view of the conflicting decision, it affords a ground for the appellate court to determine the issue, meaning the applicant had an arguable case.

Further, for the applicant, it is argued that the respondent which was based in Singapore did not have assets within the jurisdiction of this court. The judgment sum was substantial. If the applicant were to settle the judgment sum, there is strong likelihood that the applicant may not be compensated or restituted in the event of the applicant succeeding in the appeal. This would render the applicant's appeal nugatory. We agree.

Question posed by the present application, should stay of execution of the court order dated 12 December 2001 be granted? In this regard, it is pertinent to refer to the Court of Appeal case in *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380, where in that case, Hamid JCA at p. 405 observed:

> I agree that in an application for a stay of execution, that the appeal, if successful, would be rendered nugatory is the "paramount consideration" or by whatever name it is called. And, I do not think that it matters whether it is considered under the head of "special circumstances" or not, so long as it is considered and so long as he does not go so far as to say that no other factors may be considered because this is an exercise of discretion, and therefore all the relevant factors should be considered.
>
> My difficulty with *See Teow Guan* if it were to be applied to an application for a stay of execution is that that the learned judge found that the appeal would be rendered nugatory because it is doomed to failure. As I understand it, the nugatory test that the courts talk about in an application for a stay of execution goes to the subject matter of the case, not the merits of the appeal. In other words, the appeal, if successful, is worthless because the appellant cannot be put in its former position.

In *Alexander v. Cambridge Credit Corp Ltd* [1985] 10 ACLR 42 (refd), Kirby P, in delivering the judgment of the Court of Appeal of New South Wales, had this to say:

> (i) where 'the balance of convenience' is in favour of the applicant/appellant (see also *AG v. Emerson & Ors; Clyne v. Deputy Commissioner of Taxation);* and such balance of convenience may sometimes be maintained by the stay being made subject to certain conditions imposed by the court (as per provision '... may order ... on such terms as it thinks fit', in O. 45 r. 11 of the Rules, and also see *Andrews & Anor v. John Fairfax & Sons Ltd*);
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> (ii) where 'it is apparent that unless a stay is granted an appeal will be rendered nugatory ...' (see also *Wilson v. Church No 2* and *Scarborough v. Lew's Junction Stores Pty Ltd*); and
>
> (iii) that the applicant/appellant 'has an arguable' appeal.

Thus, in applying the principles as enunciated above to the facts and circumstances of the present case, we have no hesitation in finding that this is a proper case for stay to be granted. Accordingly, we order in terms as prayed. Cost to be in the cause.

My learned brother Mokhtar Sidin JCA had seen this judgment in draft and expressed his concurrence with the judgment.

Abdul Aziz Mohamad JCA:

Since the appellant's notice of motion for a stay of execution pending appeal, which I thought should be dismissed, was, in submission before us, objected to by the respondents as an abuse of the process of the court and as premature, I think it would be appropriate for me to begin by setting out the position of the law in the matter in question, on which the objection was based.

The notice of motion had to do with the registration of a foreign judgment under the Reciprocal Enforcement of Judgments Act 1958 so that it may be enforced in this country as a judgment of our High Court. Section 5 of the Act enables a judgment debtor to apply for the setting aside of the registration of a foreign judgment and sets out various grounds on which it is either mandatory or discretionary to set aside the registration. One of the grounds on which it becomes mandatory to set aside registration is that in s. 5(1)(a)(ii), namely, "that the courts of the country of the original court had no jurisdiction in the circumstances of the case". Order 67 r. 5 of the Rules of the High Court 1980 requires an order for the registration of a foreign judgment to be served

on the judgment debtor and to state the period within which an application may be made to set aside the registration. After registration, O. 67 r. 7 requires notice of the registration to be served on the judgment debtor, which shall, besides other things, state the period within which an application may be made to set aside the registration. Order 67 r. 10 prohibits the issuance of execution on a registered judgment until after that period or, if an application for setting aside is made, until the application is finally determined. It is clear therefore that a judgment debtor need not be served with an application for registration and that the application may be made *ex parte*. The judgment debtor's interests are protected because he is given the opportunity to apply to set aside the registration and execution will not issue until after his application is finally determined. It is accordingly also clear that the Act, by providing for application for setting aside for the aggrieved judgment debtor, does not envisage the need for an appeal against an order for registration.

The respondents, a company incorporated under the laws of the Republic of Singapore, claiming to be licensed moneylenders, obtained judgment in default of appearance in the High Court of that country against the appellant on a claim on a promissory note. The respondents applied in the High Court at Kuala Lumpur for registration of the judgment under the Act. The application was, however, dealt with *inter partes*, with the appellant not only opposing the application but also applying that it be struck out. The High Court ordered registration and dismissed the appellant's striking-out application (that is to say, the deputy registrar did so and the judge in chambers dismissed the appellant's appeals against the two decisions). At the same time the judge also dismissed the appellant's application to adduce fresh evidence in the appeal to the judge. Against all the three decisions of the judge the appellants filed appeals to this court. Accordingly, they applied to the High Court for a stay of execution of its decision pending the appeal, obviously in order that the judgment would not be registered and executed. The High Court refused a stay and the appellant then put in an application to this court by notice of motion for a stay.

We were informed by the respondents' counsel from the bar that notice of the registration of the judgment had not been served on the appellant and therefore the appellant did not need to worry about execution. He should, it was submitted, wait to be served with the notice, then apply within the given time to set aside the registration and until his application is decided the rules prohibit execution, and therefore no stay needed to be applied for.

The application for a stay of execution was, therefore, it was submitted, an abuse of process and was premature. It was a submission that seemed to recognize that even though the order for registration of the judgment had been obtained *inter partes*, the appellant could properly apply to set aside the registration (most likely on grounds that had been argued and decided) instead of appealing to this court.

In arriving at the opinion that the appellant's notice of motion should be dismissed, I did not find it necessary to form any opinion on the preliminary objection. I took the application as it was and arrived at the opinion that even if an appeal against the order for registration, and the consequent application for a stay, were proper proceedings, the application for a stay could not succeed. In other words, I took the appellant on the course that he had chosen and decided that that course would lead to no success.

I did, however, as far as the question of merits of the appeal was concerned, form the view that the appellant, by appealing, was not entitled to more than what the Act intended, that is to say, that the remedy on appeal could only be the remedy of setting aside provided by the Act, and that setting aside could only be ordered on some ground prescribed by the Act.

In his affidavit in support of his application to this court for a stay, the appellant expressly relied on only one point of merit in the appeal. The point was this. According to O. 79 r. 4(1), (2) of Rules of Court 1996 of the Republic of Singapore, in a moneylender's action a judgment in default of appearance or defence shall not be entered without the leave of the court and the application for leave must be served on the defendant. It would be the appellant's contention in the appeal that the judgment in default was entered without leave. The issue was not originally raised before the deputy registrar. It was sought to be raised in the appeal before the judge and for that an application was made to adduce in the appeal fresh evidence that there had been no application for leave. The application was dismissed and that decision is also under appeal. The appellant hoped to succeed in that appeal so that he could raise the issue of leave in the substantive appeal. It was submitted to us that since there was no leave to enter the judgment in default, the judgment was irregular and not valid and ought not to be registered.

The irregularity and consequent invalidity of a foreign judgment is not specified in the Act as a ground for setting aside the registration of the foreign judgment. I was of the view that the reason for that is because the courts of one country should not adjudicate on the judgment of the courts of another country. If you have grounds to invalidate a foreign judgment, you must apply to the original

court to set aside the judgment or you must appeal to the appellate court of the country of the original court. If you do not do so, the registering court has to accept the judgment as regular and cannot entertain any attempt to show that it is not. In the present case, there was no attempt to have the judgment in default set aside for non-compliance with O. 79 r. 4(1), (2). I could not see any likelihood of the appellant succeeding in the appeal on that ground.

There was only one other point which, according to the appellant's affidavit in support of his application for a stay, the appellant intended to rely on to succeed in the appeal and that was the question of jurisdiction of the High Court of the Republic of Singapore. According to s. 5(1)(a)(ii) that I have mentioned of the Act, our High Court can determine whether the High Court of Singapore had jurisdiction in the circumstances of the case and if it finds that there was no jurisdiction, the registration of the judgment shall be set aside.

Although sub-s. (2) of s. 5 sets out various circumstances in which, for the purposes of the section, the courts of the country of the original court shall be deemed to have had jurisdiction, those circumstances are in my view only deeming circumstances and do not preclude a judgment creditor from showing that actually, in law, the courts of the country of the original court had jurisdiction.

The question of jurisdiction arose in this way. In para. 8 of his affidavit dated 8 May 2000 in support of his striking-out application, the appellant stated his belief that the Singapore High Court had no jurisdiction to enter the default judgment because he had never submitted to the jurisdiction of that court. The paragraph evidenced the appellant's belief that for the purpose of s. 5(1)(a)(ii) of the Act – that is to say, for the purpose of the question of setting aside the registration of the judgment on the ground that the Singapore High Court had no jurisdiction – the Singapore High Court would only have jurisdiction if the appellant submitted to its jurisdiction. The respondents in para. 9 of their affidavit dated 7 June 2002 contended that the Singapore High Court had full jurisdiction to enter the judgment. As I have related, the appellant lost in the High Court, the judgment in default was ordered to be registered, the appellant filed an appeal to this court, failed to obtain from the High Court a stay pending appeal, and finally applied for a stay to this court. In para. 14 of the appellant's affidavit dated 21 May 2002 in support of his stay application to this court, which was identical with para. 6 of his affidavit dated 4 January 2002 in support of his earlier stay application to the High Court, the applicant said this in the first sentence:

Saya juga mempertikaikan perbuatan Pemiutang Penghakiman yang telah menggunakan Seksyen 16(1)(a)(ii) Supreme Court of Judicature Act 1985 Singapura untuk menyatakan bahawa saya telah menyerah diri kepada bidang kuasa Mahkamah Tinggi Republik Singapura.

Rather strangely, those two paras. 14 and 6, were placed in each case under the heading of "Keadaan Khas" (Special Circumstances).

It was apparent that in the High Court, against the appellant's contention that the Singapore High Court would only have jurisdiction if the appellant had submitted himself to its jurisdiction, the respondents had relied for jurisdiction on s. 16(1)(a)(ii) of the Supreme Court of Judicature Act (Cap. 322) of the Republic of Singapore. As will later be seen, jurisdiction under that section is not dependent on submission to jurisdiction, so that it would have been illogical if, as alleged by the appellant in his affidavit, the respondents had actually resorted to s. 16(1)(a)(ii) to claim that the appellant had submitted himself to the jurisdiction of the Singapore High Court. In his skeletal submission for this court, in relation to the said paragraph of his affidavit, the appellant still maintained: "Submission to the jurisdiction of the Singapore High Court may only be made expressly". There was no express argument against the respondents' reliance on s. 16(1)(a)(ii), except that there was mention of two conflicting decisions and about service of a writ of summons by an agent, which could have been intended to be used to support a point against reliance on that section. The two decisions were *Saeed U Khan v. Lee Kok Hooi* [2000] 7 CLJ 454 and *Commerzbank (South East Asia Ltd) v. Tow Kong Liang* [2002] 3 CLJ 95.

It is necessary to reproduce s. 16(1):

(1) The High Court shall have jurisdiction to hear and try any action *in personam* where:

(a) the defendant is served with a writ or other originating process:

(i) in Singapore in the manner prescribed by Rules of Court; or

(ii) outside Singapore in the circumstances authorised by and in the manner prescribed by Rules of Court; or

(b) the defendant submits to the jurisdiction of the High Court.

It is evident from the subsection that submission to jurisdiction that the appellant contended was the only way by which the Singapore High Court could have jurisdiction is under para. (b), which is separate from the basis for jurisdiction which the respondents relied on, namely that in para. (a)(ii). According to that

subsection, by Singapore law, where jurisdiction over an action *in personam* is concerned, the jurisdiction of the High Court depends either on voluntary submission to jurisdiction or on service of the originating process. Where service is outside Singapore, the service must be "in the circumstances authorised by and in the manner prescribed by Rules of Court". If service on a defendant outside Singapore is in those circumstances and manner, the Singapore High Court shall have jurisdiction over the action.

In this case, service of the writ of summons had been effected on the appellant in Kuala Lumpur by personal service by an employee of Skrine & Co. of Kuala Lumpur, the firm of solicitors appointed by the respondents' solicitors in Singapore to effect service of the writ. The question to be answered then is whether that service was effected "in circumstances authorized by and in the manner prescribed by Rules of Court".

According to O. 11 r. 3(8)(a) of the Rules of Court 1996 of the Republic of Singapore, "Where the defendant is in Malaysia or Brunei Darussalam, the originating process ... may be served in accordance with r. 4". Paragraph (2) of r. 4 provides for the manner of serving an originating process on a defendant in any country with respect to which there does not subsist a Civil Procedure Convention providing for service in that country of process of the Singapore High Court. There was no dispute that Malaysia is such a country. Paragraph (2) of r. 4 provides for three modes of service, mode (c) being "by a method of service authorised by the law of that country for service of any originating process issued by that country". The question that then arises is: by Malaysian law what is the method of service authorised for service of an originating process issued by Malaysia? The Malaysian law is the Rules of the High Court 1980. If service of the Malaysian process is to be done in Malaysia, one of the required, and therefore authorized, methods is personal service by virtue of O. 10 r. 1(1), which was how the appellant was served. If service of the Malaysian process is to be done outside Malaysia, O. 11 r. 6 provides for several methods of, or rather avenues for, effecting service, one of which, whether or not there subsists a Civil Procedure Convention with respect to the country in which the defendant is to be served, is, according to paras. (1)(b)(ii) and (2)(b)(ii), "by the plaintiff or his agent", which was by whom the writ was served on the appellant in this case, namely by the agent of the respondents, who were the plaintiffs. It would appear from the citing of the aforementioned two cases in the appellant's skeletal submission that the appellant wanted to say that service by agent on him was not an authorized mode of service under Malaysian law. That is obviously untrue. If one were to go by the authorized method of service outside Malaysia, service "by the plaintiff or his agent" is expressly authorized by O. 11 r. 6(1)(b)(ii) and 6(2)(b)(ii). If one were to go

by the method for service in Malaysia, the method under O. 10 r. 1(1) is personal service. Nothing is said, whether there or in O. 62 r. 3, which speaks of how personal service is to be effected, as to by whom it is to be effected. Since what is prescribed is the method and not the person, it should not matter by whom the service is effected so long as the prescribed method is followed. For service in Malaysia, service by the plaintiff is so obvious an avenue that the rules do not need to expressly authorize it. So is service by the plaintiff's agent. When one speaks of service by an agent being or not being allowed, one must be speaking of service by some private agent of the plaintiff's as opposed to service by a governmental agency, such as a court process server, and not as opposed to service by the plaintiff himself. It is inconceivable that any legal regime would expect every plaintiff to serve the process himself. The great majority of them would have to employ an agent, such as their solicitors, who in turn would need to employ someone to actually effect the service. In the case of paras. 1(b)(ii) and 2(b)(ii) of O. 11 r. 6, it is necessary to expressly state that the process may be served "by the plaintiff or his agent", because those paragraphs deal with service of our process in a foreign country and need to provide for service through the authorities there. The policy being to allow also the plaintiff or his agent to serve, they need to be expressly mentioned as otherwise it would be construed that service by them is not recognized.

Mention has been made of two cases cited by the appellant in relation to the issue of jurisdiction of the Singapore High Court. Both were decisions of the High Court. In *Saeed U Khan v. Lee Kok Hooi* [2000] 7 CLJ 454, Faiza Tamby Chik J said at p. 457 h: "It cannot be disputed that service by way of a private agent is an authorized method of service in Malaysia". The case was not in favour of the appellants. In *Commerzbank (South East Asia Ltd) v. Tow Kong Liang* [2002] 3 CLJ 95, unlike in this case, the question of manner of service did not arise from a dispute as to the jurisdiction of the Singapore High Court. It arose as a reason for contending that the registration of a judgment of the Singapore High Court should be set aside on the ground, as provided in para. (v) of s. 5(1)(a) of the Act, "that the enforcement of the judgment would be contrary to public policy". In that case the Singapore writ was served personally in Malaysia (Johor Bahru) by an advocate and solicitor. The learned judge (Abdul Wahab b Patail J) considered that the service of the writ of summons should have been done in accordance with O. 65, under which service by an agent is not allowed because rr. 2(3) and 3(3) provide that "Service shall be effected by the process server", meaning the process server of the High Court. The learned judge held that because service of the Singapore writ in Malaysia was not in accordance with O. 65 and was therefore an exercise of sovereignty in Malaysia without Malaysia's consent, the enforcement of the

judgment in default of appearance that ensued would be contrary to public policy in Malaysia.

If the question of service that arose in this case in relation to the question of the jurisdiction of the Singapore High Court fell to be decided on the basis of O. 65, then of course service by agent would not be an authorized mode of service because under O. 65 service must be by a process server. But O. 65 does not come into play in the question of service in this case. Order 65 concerns service of a foreign writ in Malaysia, whereas, as has been seen, service for the question of jurisdiction of the Singapore High Court is service in the circumstances authorized or manner prescribed by the Rules of Court of the Republic of Singapore, and the effect of O. 11 r. 3(8)(a) and r. 4(2)(c) of those Rules of Court is, where the defendant is in Malaysia, to authorize a method of service that is authorized by the law of Malaysia for service of any originating process issued by Malaysia – not by another country – and our O. 10 and O. 11 neither allows, by not prohibiting, service by an agent where service of the Malaysian process is to be in Malaysia or expressly allows service by an agent where the Malaysian process is to be served abroad.

I would not like to leave O. 65 and the *Commerzbank* case without observing that O. 65 does not lay down that its provisions constitute the only allowed mode of service of a foreign process in Malaysia. Rules 2 and 3 are the material provisions. Paragraph (1) of r. 2 states (with my own emphasis):

> (1) This rule applies in relation to the service of any process required in connection with civil proceedings pending before a court or other tribunal of a foreign country where a letter of request from such a tribunal requesting service on a person in Malaysia of any such process sent with the letter is received by the Minister and is sent by him to the High Court with an intimation that it is desirable that effect should be given to the request.

Paragraph (1) of r. 3 states (with my own emphasis):

> (1) This rule applies in relation to the service of any process required in connection with civil proceedings pending before a court or other tribunal of a foreign country where a letter of request from such a tribunal requesting service on a person in Malaysia of any such process sent with the letter is received by the Minister and is sent by him to the High Court with an intimation that it is desirable that effect should be given to the request.

It is obvious from the words that I have emphasized that the provisions of rr. 3 and 4 are to apply only in cases where, to put it simply, there is a government-to-government request for service of a foreign process on a person in Malaysia. Order 65 does not lay down that service of a foreign process in Malaysia may only be done on a government-to-government request.

Since I could see no likelihood of the appellant succeeding in the appeal, I was of the view that stay of execution of the order to register the judgment ought to be refused.

The appellant argued that if stay was refused and execution proceeded and he settled the amount of the judgment, but his appeal ultimately was allowed, his appeal would have been rendered nugatory because he would not be able to recover from the respondents, a company incorporated in Singapore, the money that he had paid to them since they had no assets in Malaysia. I disagreed that the appeal would be rendered nugatory. The appellant could seek recovery in the Republic of Singapore. There was no evidence to throw doubt on the respondents' ability to refund the judgment sum. Even on that consideration alone, I was of the view that the stay sought, which was a stay of execution pending appeal, should be refused.